FILED
FEB 27 1890
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN D. SANBORN, PLAINTIFF IN error,
vs.
THE UNITED STATES.
} No. 225.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN D. SANBORN, PLAINTIFF IN error,
vs.
THE UNITED STATES.
No. 225.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

STATEMENT OF FACTS.

By the act of May 8, 1872 (17 Stat., 69), it was provided that—

> The Secretary of the Treasury shall have power to employ not more than three persons to assist the proper officers of the Government in discovering and collecting any money belonging to the United States, whenever the same shall be withheld by any person or corporation, upon such terms and conditions as he shall deem best for the interests of the United States, but no compensation shall be paid to such person, except out of the money and property so secured, and no person shall be employed under the provisions

> of this clause who shall not have fully set forth in a written statement, under oath, addressed to the Secretary of the Treasury, the character of the claim out of which he proposes to recover, or assist in recovering moneys of the United States, the laws by the violation of which the same have been withheld, and the name of the person, firm, or corporation having thus withheld such moneys.

On the 15th of July, 1872, John D. Sanborn made application for employment under this act, and filed a sworn statement with a list of names of persons alleged to have unlawfully withheld taxes and moneys.

On August 13, 1872, the Acting Secretary of the Treasury notified Sanborn of his employment under the act, and on the same date entered into a contract with him (Rec., p. 5), which contract set forth, among other things, that whereas Sanborn had filed a written statement, under oath, alleging a large sum of money to be due the United States from persons named, as taxes upon spirituous liquors, it was agreed that he should collect them and receive as his compensation 50 per centum upon the amount collected.

On the 25th of October, 1872, Sanborn submitted a second written statement, under oath, and another long list of names of persons alleged to have illegally withheld taxes due on legacies, successions, incomes, etc. (Rec., p. 6.)

Said list included taxes alleged to be due from and withheld by the estate of John E. Wool, deceased.

Under date of October 30, the contract of August 13 was extended and enlarged, so as to embrace and relate to

the second list presented by Sanborn, including the estate of John E. Wool. (Rec., p. 7.)

General John E. Wool died in Troy, N. Y., on the 10th day of November, 1869, leaving Sarah, his wife, surviving. He left a will, by which he bequeathed a large number of legacies to persons of different degrees of relationship and others; said legacies to be paid after the death of Sarah, his wife. (Rec., p. 8 to 14.)

The will was proven and entered of record on May 14, 1870, and letters testamentary were issued to Asher P. Morgan and John A. Griswold. Griswold died in 1872, leaving Morgan as sole executor.

John T. Masters was collector of internal revenue at Troy, and was the proper officer of the Government to receive the taxes, if any were due, from the estate of Wool. He had information as to the death of General Wool, and was also acquainted with the terms and provisions of the will. No legacy taxes were due from said estate, and none would become due until after the decease of the widow. Both the collector and his deputies were familiar with all these facts; they knew that said Wool left a large estate to be distributed; that the legacies became payable upon the death of Mrs. Wool. They talked over these facts, both before and after her death, and were ready to take all necessary steps to secure the taxes at the proper time.

Sarah Wool, the widow, died May 8, 1873. This being the case, it follows that when Sanborn made his second list of cases, including the Wool estate, and the supplementary contract of employment October 30, 1872,

there was no tax due upon the legacies contained in the will of General Wool, nor was anything withheld by the executors or anybody else.

The sworn statement of Sanborn, so far as it related to the Wool estate, was untrue, and the contract made between him and the Secretary of the Treasury was based upon this false statement, and upon an entire mistake as to the facts.

Within a few days after the death of Mrs. Wool, Morgan, the executor, wrote the Secretary of the Treasury, asking him to refer the question of the liability of the Wool estate for taxes to some person in authority, and he received a reply from the Secretary referring all questions relating to said matter to Lucien Hawley, supervisor of internal revenue for the district, and with this officer the executor had several consultations in regard to the case.

On July 31, 1873, Masters, the collector of internal revenue, wrote to Executor Morgan, making a demand for a return on account of the Wool estate.

On the 1st day of August, 1873, said Morgan delivered to Lucien Hawley, the supervisor, a draft for the sum of $14,668, in payment of the taxes held to be due. (Rec., p. 15.)

On the same day Hawley turned said draft over to John D. Sanborn. On the 3d day of August Sanborn forwarded the draft to the Secretary of the Treasury (Rec., p. 16.), and he turned it, with other moneys, over to the Treasury of the United States, to be placed to his credit as Secretary.

On the 16th day of August, 1873, the Secretary of the

Treasury gave Sanborn his check for $16,001.34, which sum included $7,334 allowed as 50 per cent. of the amount collected from the Wool estate.

Under the law imposing legacy and succession taxes (section 124 of act of June 30, 1864, 13 Stats., 285), as amended by act of July 13, 1866 (14 Stats., 140), the tax on legacy or distributive share of personal property passing by will of any person dying on or after August 1, 1866, and before October 1, 1870, did not become due and payable until the legacy was payable, *i. e.*, until such time as the beneficiary became entitled to possession.

Legacies to a wife were exempted from tax.

Section 3 of the act of July 14, 1870 (16 Stat., 256), repealed after October 1, 1870, the tax on legacies and successions. Section 17 of the same act saved all such taxes as had been assessed, were liable to be assessed, or accruing under the repealed acts.

Section 125, act of June 30, 1864, as amended (13 Stat., 286), makes the legacy tax a lien and charge upon the property of every person who may die, for twenty years, whether assessed or not.

The taxes in the Wool estate were paid by the executor without protest, and no application for a refunding has ever been made. (Rec., p. 19.)

The United States sued Sanborn in the circuit court of the United States for the district of Massachusetts, and recovered judgment in the sum of $13,052.08, being the sum of $7,334 and interest up to the time of the rendition of the judgment. From the judgment so recovered Sanborn has taken an appeal and the case is brought here for review.

BRIEF AND ARGUMENT.

I.

CONTRACT FRAUDULENT ON PART OF SANBORN AND MONEY PAID UNDER MISTAKE OF FACT.

The contract of October 31, 1872, between Sanborn and the Secretary of the Treasury was null and void, so far as related to the tax upon the estate of John E. Wool, and the transaction by which Sanborn obtained possession of the sum of $7,334 was fraudulent upon his part. The sworn statement made by him to the Secretary that the taxes from the estate of Wool were wrongfully withheld was false. The taxes were not due until the death of Sarah Wool, the widow. She died March 8, 1873, about seven months after Sanborn had filed his sworn statement. By and through this statement he had induced the Secretary to enter into the contract.

The contract was founded wholly on a mistake of facts, so far as the Secretary was concerned, and the money was paid to Sanborn under the same mistake of facts.

The taxes could not have been withheld for the reason that they were not due, and when they did become due there was no withholding by the executor. On the contrary he immediately took steps to have the amount ascertained, in order that he might pay it over to the Government, and just as soon as the amount was ascertained, he did pay it over, and it went into the Treasury of the United States.

But for the statement of Sanborn no contract including the Wool estate would ever have been entered into. The

whole action of the Secretary was based upon and grew out of the representations made to him, all of which were erroneous.

Under these circumstances the contract was void and of no effect. This is so whether it is treated as a contract induced by fraud and misrepresentation, or as made and the money paid under a mistake of fact.

II.

CONTRACT VOID FOR WANT OF POWER TO MAKE IT.

The contract made between the Secretary of the Treasury and Sanborn was not only void on account of fraud or mistake, but it was also void for want of power on the part of the Secretary to make it. The only power possessed by him to make any contract with Sanborn was contained in the statute passed by Congress on the 8th of May, 1872. By that act he was authorized to employ certain persons to assist the proper officers of the Government *in discovering and collecting any money belonging to the United States, whenever the same shall be withheld* by any person or corporation.

The claims mentioned in the act of Congress, and intended to be embraced therein, were old taxes, old debts, long past due, and which the regular officers of the Government had lost sight of, or had failed to collect by the ordinary methods. The statute contemplated that there should be a withholding by the person or corporation owing the Government, and that the person making a contract with the Secretary should discover, dig up, and

collect those taxes so withheld, and which ought to have been paid long ago.

It was only when the claim should come within this description that the Secretary was authorized to make any contract at all. He had no power to employ Sanborn or anybody else to collect claims not yet due; neither could he contract for the collection of a claim already due, unless the same was unlawfully withheld. The claim for taxes in the Wool estate did not belong to this class; was not covered by or referred to in the statute, and was, therefore, not the subject of contract between the Secretary and Sanborn.

As well might the Secretary attempt to employ persons to collect the President's salary, or any other well ascertained sum of money to become due, and about the payment of which there was no controversy.

From the foregoing it follows that the sum of $7,334, which Sanborn got possession of by the means herein set forth, did not belong to him, and he has no right to retain it now. The Secretary paid it to him under a misapprehension of the facts, and without any authority, and Sanborn had no claim upon it and no right to receive it. Having obtained possession of it in this manner, he is in law and equity under obligation to account for it, and to pay it back, together with the interest which has accrued thereon.

III.

It is not seriously contended by the defendant that the claim for taxes against the Wool estate was rightfully included in the contract made with the Secretary, or that

there is any good defense in the case as against the real owner of the money.

There are, however, certain defenses sought to be made against the right of the United States to recover. These will be considered in their order.

AS TO THE STATUTE OF LIMITATIONS.

The claim of Sanborn, in his answer, that the action of the United States against him was barred by the statute of limitations can not be maintained.

The statute of limitations does not run against the United States. This doctrine has been recognized and enforced by the courts from the beginning of the Government, and is supported by numerous decisions.

The Supreme Court, in the case of *The United States* vs. *Thompson* (98 U. S. R., 486), has declared that—

> The United States, whether named in a State statute of limitations or not, is not bound thereby; and when it sues in one of its own courts, such a statute is not within the provisions of the judiciary act of 1789, which declare that the laws of the States in trials at common law shall be regarded as rules of decision in the courts of the United States, in cases where they apply.

The above case is a careful review of the subject, and is conclusive of the question.

In *United States* vs. *Nashville, Cincinnati and St. Louis Railroad Company* (118 U. S., 120) it is held that—

> The statute of limitations of a State does not run against the right of action of the United States upon negotiable bonds and coupons of a railroad corpora-

> tion, purchased by the United States before maturity as an investment of money received from the sale of lands ceded by an Indian tribe, and held in trust for the tribe, under a treaty.

And Mr. Justice Gray, in delivering the opinion, says:

> It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all Governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign Government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. (*Lindsey* v. *Miller*, 6 Pet., 666; *United States* v. *Knight*, 14 Pet., 301, 315; *Gibson* v. *Chouteau*, 13 Wall., 92; *United States* v. *Thompson*, 98 U. S., 486; *Fink* v. *O'Neil*, 106 U. S., 272, 281.)

Very many other authorities might be cited, but it is unnecessary to do so.

IV.

STATE OF LAW AS UNDERSTOOD WHEN TAX WAS COLLECTED.

The last clause in the answer of Sanborn asserts:

> That in said suit certain parties are seeking alleged private rights in the name of the United States.

This is a vague statement. No specification is made as to wherein and for whom the United States is prosecuting the action, and it is doubtful what is the meaning of the defendant by the terms and expressions used.

We are informed that in the trial of the case Sanborn sought to make the defense that the money sued for did not belong to the United States, but did, as a matter of fact, belong to the heirs and legatees of John E. Wool.

It was claimed upon the trial that the tax of $14,668 paid by the executor of said estate was wrongfully assessed and collected, for the reason that the statute requiring a tax upon legacies had been repealed.

In this connection it may be proper to consider the legislation relating to this matter and the state of the law as the same was held to be at that time upon the subject.

The law creating a tax upon legacies was passed June 30, 1864, and was amended July 13, 1866 (14 Stat., 140). It was in full force at the time of General Wool's death, and also at the time of the probate of his will.

The act of Congress repealing it was passed July 14, 1870 (16 Stat., 256), and was to take effect on and after October 1, 1870. This repealing statute contained the following provision (sec. 17, p. 261):

> * * * That all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved. * * *

It will be seen that the provisions of the act of 1864 were continued in full force as to all taxes properly as-

sessed, or liable to be assessed, or accruing under the provisions of former acts.

The tax, it is true, was not due and payable in October, 1870, when the repealing statute came into force. But the estate of Wool became at the moment of his death liable to a tax. The liability was then and there created and attached, but the time of payment was postponed until the decease of the widow.

An express provision of the statute (act of June 30, 1864, as amended, 13 Stat., 286) made the tax a lien and charge upon the property of the testator for a period of twenty years after his death. The property became charged with the tax on the 10th of November, 1869, the date of General Wool's death. From that time forward it became and was a valid claim in favor of the Government. The estate was held for it. It had accrued. The amount and character of the tax was understood and determined, and the executor awaited only the falling due of this existing indebtedness, at which time it would be his duty to pay the money and remove the lien from the property of the estate.

The repeal of the law providing for a tax on legacies might, therefore, be very properly held not to include or apply to the one under consideration. It was covered by the saving clause and proviso of the repealing act.

The following authorities were relied upon: In the case of *Meredith and others* vs. *The United States* (13 Peters, 486), it was held that—

> The right of the Government to the duties accrues, in the fiscal sense of the term, when the goods have

arrived at the port of entry. The debt for the duties is then due, although it may be payable afterwards according to the regulations of acts of Congress.

On the 7th of May, 1872, in the circuit court of the United States for the district of Massachusetts, in the case of *Mason et al.* v. *Slack, collector* (16 Int. Rev. Rec., 134), it was decided as follows:

> M. died February 23, 1870, testate, and bequeathed certain pecuniary legacies, which were paid by his executors in April, 1871; the act of July 14, 1870, repealed taxes on legacies on and after October 1, 1870, saving taxes already accrued: *Held*, that a tax was properly assessed as "accrued" upon said legacies under the saving clause contained in section 17, act of July 14, 1870, chapter 255 (16 Stat. at Large, 261).

And Lowell, judge, in delivering the opinion, says:

> Upon the whole, we are of opinion that by the internal-revenue law the tax is to be taken to accrue upon a pecuniary legacy immediately on the death of the testator, though not payable until the legacy is payable.

Again, in the same court, at the October term, 1876, in the case of *Mason and others* vs. *Sargent* (23 Int. Rev. Rec., 155), Shipley, judge, held that—

> The tax upon a pecuniary legacy under the provisions of these statutes must be taken to have accrued immediately upon the death of the testator, though not due and payable until the party interested in the legacy becomes entitled to the possession or enjoyment thereof, or the beneficial interest in the profits accruing therefrom. The lien of the United

States for the tax attached to the fund in the hands of the executors and trustees as soon as they entered upon the trust.

In the case of *United States* vs. *Hellman*, in the district court for the southern district of New York (23 Int. Rev. Rec., 387), the court approves the decision in the case of *Mason* v. *Sargent*, above referred to.

Afterwards, in 1881, however, the case of *Mason* v. *Sargent* came before the Supreme Court of the United States for adjudication, and the decision of the circuit court was reversed, the court holding the contrary doctrine.

The following is the syllabus of the case (104 U. S., 689).

A testator who died December 4, 1867, bequeathed certain personal property to trustees, to be held by them in trust for his widow during her life, and on her death to his children. She died June 17, 1872. *Held* that a legacy tax upon the property was without authority of law, assessed in April, 1873, as no right to the payment thereof had accrued at the date when the act of July 14, 1870, c. 255 (16 Stat. 256), repealing such tax, took effect.

It will appear from this review of the statutes and the decisions of the courts, that at the time the taxes were paid by the executor it was in accordance with the ruling of the Internal Revenue Office, and of the adjudications of the courts, so far as they had at that time been made. It now seems to be assumed that the ruling and determination of the question was erroneous. But whatever may be the law and the proper decision upon the sub-

ject, it clearly appears that the legal aspect of the question was fully considered by the executor and after full examination he paid the money into the Treasury.

IV.

THE MONEY BELONGS TO THE UNITED STATES.

So far as the present contention is concerned, it is immaterial whether the repealing act of 1870 had the effect to relieve the executor of the estate of Wool from the payment of the legacy taxes, or not.

He took the matter under careful consideration. He had full and accurate knowledge of all the facts. At his own request it was submitted for examination to Lucian Hawley, a supervisor of internal revenue. Acting upon this report, as well as upon his own judgment, and after thorough examination of the question of his legal liability, he voluntarily paid over the money, and it went into the Treasury of the United States and became a part of the public moneys.

Such voluntary payment by the executor, there being no mistake or misunderstanding as to the facts, made it the money of the Government, and it never could be recovered back, even though an action were brought for that purpose by the executor himself.

This doctrine must prevail even if we assume that there was no legal liability for the tax upon the part of the Wool estate, and that it was collected and paid under a mutual mistake as to the law. In such a case it has been repeatedly held that money so paid can not be recovered back.

> States for the tax attached to the fund in the hands of the executors and trustees as soon as they entered upon the trust.

In the case of *United States* vs. *Hellman*, in the district court for the southern district of New York (23 Int. Rev. Rec., 387), the court approves the decision in the case of *Mason* v. *Sargent*, above referred to.

Afterwards, in 1881, however, the case of *Mason* v. *Sargent* came before the Supreme Court of the United States for adjudication, and the decision of the circuit court was reversed, the court holding the contrary doctrine.

The following is the syllabus of the case (104 U. S., 689).

> A testator who died December 4, 1867, bequeathed certain personal property to trustees, to be held by them in trust for his widow during her life, and on her death to his children. She died June 17, 1872. *Held* that a legacy tax upon the property was without authority of law, assessed in April, 1873, as no right to the payment thereof had accrued at the date when the act of July 14, 1870, c. 255 (16 Stat. 256), repealing such tax, took effect.

It will appear from this review of the statutes and the decisions of the courts, that at the time the taxes were paid by the executor it was in accordance with the ruling of the Internal Revenue Office, and of the adjudications of the courts, so far as they had at that time been made. It now seems to be assumed that the ruling and determination of the question was erroneous. But whatever may be the law and the proper decision upon the sub-

ject, it clearly appears that the legal aspect of the question was fully considered by the executor and after full examination he paid the money into the Treasury.

IV.

THE MONEY BELONGS TO THE UNITED STATES.

So far as the present contention is concerned, it is immaterial whether the repealing act of 1870 had the effect to relieve the executor of the estate of Wool from the payment of the legacy taxes, or not.

He took the matter under careful consideration. He had full and accurate knowledge of all the facts. At his own request it was submitted for examination to Lucian Hawley, a supervisor of internal revenue. Acting upon this report, as well as upon his own judgment, and after thorough examination of the question of his legal liability, he voluntarily paid over the money, and it went into the Treasury of the United States and became a part of the public moneys.

Such voluntary payment by the executor, there being no mistake or misunderstanding as to the facts, made it the money of the Government, and it never could be recovered back, even though an action were brought for that purpose by the executor himself.

This doctrine must prevail even if we assume that there was no legal liability for the tax upon the part of the Wool estate, and that it was collected and paid under a mutual mistake as to the law. In such a case it has been repeatedly held that money so paid can not be recovered back.

The case of *Elliott* vs. *Swartwout* (10 Peters, 137) was an action brought against the collector of customs for the port of New York to recover $3,150 received by him as duties upon certain property imported into the United States. The collection was claimed by Elliott to be erroneous, and the important question in the case was whether taxes erroneously paid and collected could be recovered back, and in the consideration of the case the court held that:

> A collector of the revenue is not personally liable in an action to recover back an excess of duties paid, as collector, and by him in the regular or ordinary course of his duty paid into the Treasury of the United States; he, the collector, acting in good faith and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him.

The doctrine of the above case is affirmed in the case of *Cary* vs. *Curtiss* (3 Howard, 236). The syllabus of the case is as follows:

> Since the passage of the act of Congress of March 3d, 1889, chap. 82, sect. 2, which requires collectors of the customs to place to the credit of the Treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him.

The case of the *City of Philadelphia* vs. *The Collector* (5 Wallace 720) was one arising under the internal-revenue laws of the United States. In that case the court, in the

course of the opinion (p. 731–32) uses the following lanuing language:

> Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.
>
> When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury, but when the duties or taxes are illegally demanded, and he pays the same under protest, or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted.
>
> Decisions to the same effect were made in the parent country at a very early period, and like decisions are to be found in the judicial reports of all, or nearly all, of the several States.

The case of *Lamborn* vs. *The County Commissioners* (97 U. S., 181), is satisfactory and conclusive upon the point under consideration.

In that case certain taxes were charged upon lands in the State of Kansas. A was required to pay all taxes legally assessed on them. These taxes so charged were held by the supreme court of that State to be valid. Not having been paid, the county treasurer advertised and sold the lands, the county bidding them in. Afterwards C,

the trustee of A, relying upon the validity of the tax, paid, without protest, a sum sufficient to redeem the lands, and received the tax certificate therefor. The Supreme Court of the United States afterwards declared the taxes so assessed against the lands illegal, thereby reversing the supreme court of Kansas. C then tendered back his certificate, and brought suit to recover the money he had paid: *Held* that the payments by him so made, there having been neither fraud, mistake of fact, nor duress, were voluntary in such a sense as to defeat the action.

Mr. Justice Bradley, in delivering the opinion, says:

> Mistake, in order to be a ground of recovery, must be a mistake of fact and not of law. Such, at least, is the general rule. (3 Pars. Contr., 398; *Hunt* v. *Rousmananiere*, 1 Pet., 1; *Bilbie* v. *Lumley*, 2 East, 183; 2 *Smith*, *Lead. Cas.*, 398 (6th ed., 458), notes to *Marriot* v. *Hampton*.) A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, can not be revoked, and the money so paid can not be recovered back. (*Clarke* v. *Dutcher*, 9 Cow. (N. Y.), 674; *Ege* v. *Koontz*, 8 Pa. St., 109; *Boston and Sandwich Glass Co.* v. *City of Boston*, 4 Metc. (Mass.), 181; *Benson and another* v. *Monroe*, 7 Cush. (Mass.), 125; *Milnes* v. *Duncan*, 6 Barn. and Cress., 671; *Stewart* v. *Stewart*, 6 Cl. and Fin., 911; and see cases cited in note to 2 *Smith*, *Lead. Cas.*, 403, 404 (6th ed., 466), *Marriot* v. *Hampton*.)

It can, therefore, be confidently asserted that by the voluntary payment of the sum of $14,668, as taxes due and owing to the Government, after full and careful consideration of the subject and with full knowledge of all

the facts, the money so paid by the executor became, was, and is the the property and money of the United States, and belongs to the Government just as much as any other money paid into the Treasury. And when you add to this the fact that no claim for a refunding has ever been made, either by the executor or the heirs or legatees of John E. Wool, it seems to be placed beyond debate or question.

V.

SANBORN IS ESTOPPED FROM DENYING THAT THE MONEY BELONGS TO THE UNITED STATES.

John D. Sanborn is estopped from contending that the money does not belong to the Government by reason of his own declarations and acts in reference thereto. He is met at the threshold of the case with the important fact that there is not a particle of equity in his defense. He is compelled to admit that the $7,334 was obtained by him from the Government by false pretenses, and that the action of the Secretary was founded upon a mistake of fact, and he now seeks to avoid paying it back upon the pretense that the money which he represented to be the property of the Government was, in fact, the property of somebody else, and that his statement, made under oath to the Secretary of the Treasury, was untrue. He obtained the money by fraud, and now he seeks to shelter himself from liability by setting up his own wrong and the error into which he led the Secretary.

Upon this branch of the subject the events connected with the transaction, showing the manner by which he ob-

tained possession of the money, may be profitably considered.

On the 30th of October, 1872, he made oath that the taxes on legacies and successions were due from the estate of John E. Wool to the United States and that they were withheld. This was his first declaration that the money belonged to the Government.

On the same day he entered into a supplementary contract with the Secretary of the Treasury to collect them *for* the Government. This was a second declaration that the Government was entitled to the money.

On the 1st day of August, 1873, he received from Lucian Hawley, supervisor, a draft for $14,668, being for the Wool taxes. This draft was received by him as and for said taxes, to be by him paid over to the Secretary of the Treasury.

On the 3d of August he turned this draft over to the Secretary of the Treasury as money belonging to the United States, and the whole of the money then went into the Treasury. This was the third acknowledgment that it belonged to the Government.

On the same day he requested that the Government pay to him the sum of $7,334 on account of his alleged collection of the legacy taxes.

On the 9th of August he receives from the Secretary of the Treasury the sum of $7,334, as money falling due him on account of the Wool estate.

Here was a fourth and final act and declaration upon his part that the moneys collected from the Wool estate belonged to the United States.

After being a party to this series of transactions, and having asserted in so many different ways that these were Government moneys, he will not now be permitted to come into court and insist that the United States was never entitled to the money.

On this doctrine of estoppel we call attention to some of the authorities.

In the case of *Kinsman et al.* vs. *Parkhurst* (18 Howard, 289) it was held that—

> Where there was an agreement between a patentee and an assignee that the latter should manufacture the machine for a certain time and upon certain terms, it is too late for him, when called upon in chancery for an account, to deny that the patentee was the original inventor of the thing patented.

And the court says on page 293:

> Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner can not protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him.

In *Gold Mining Company* vs. *National Bank* (96 U. S., 640) it is held that—

> A defendant sued by a national bank for moneys it loaned him can not set up as a bar that they exceeded in amount one-tenth part of its capital stock actually paid in, and therefore had no right to make the loan.

When both parties assert title from a common grantor and no other source, neither can deny that such grantor

had a valid title when he executed his conveyance. (*Gaines* vs. *New Orleans*, 6 Wall., 642; *Robertson* vs. *Pickrell et als*, 109 U. S., 608.)

When a party gives a reason for his conduct, he can not, after litigation is begun, change his ground. (*O. and Miss. R. R. Co.* vs. *McCarthy*, 96 U. S., 258.)

A party employed to conduct a lottery, who fraudulently draws a ticket owned by himself and receives the money, when sued by the proprietors of the lottery for money had and received, can not defend against his fraud on the ground that the lottery was unlawful. (*Catts* vs. *Phelan*, 2 Howard, 376.)

Where persons have received stock of a railroad and received interest upon it for several years, *held* that the holders thereof and their assigns are estopped from questioning the power of the company to issue it. (*Branch* vs. *Jesup*, 106 U. S., 468.)

A party can not occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. (*Bigelow on Estoppel*, 503 to 510; *Herman on Estoppel*, 212, 219, 237, 320, 331, 354; *Greenleaf on Ev.*, 23, 207.)

VI.

It seems to have been argued in the court below by the defendant that he ought not to be required to pay this money to the Government, because the executor of the Wool estate may possibly have a claim against Sanborn for it.

It is not, we think, seriously contended that Sanborn

is liable to that estate, and this is only an excuse to avoid paying the money back to the Government.

The executor or heirs of Wool may have an equitable claim for these moneys against the United States, upon which Congress might act if the case should be properly presented to that body. But, whether the Government ever pays back the money or not, Sanborn is not entitled to any portion of it. Neither is there any claim of the Wool estate against him for a refund of the money. The collection of these moneys was the action of the Government, and Sanborn is not answerable to the representatives of Wool. The Government stands between him and the Wool estate. The Government obtained this money, holds it, and is answerable for it, if anybody is; and if through an act of Congress, or by any other means, the legatees of that estate should become entitled to recover it back from the United States, the Secretary of the Treasury should be put in a position to meet the demand. This can only be done by requiring Sanborn to return the money which he wrongfully obtained.

As the case stands, the United States has paid to Sanborn a sum of money to which he is not and never was entitled, and by every rule of law or equity he should be required to account for it to the party from whom he wrongfully obtained it.

The judgment of the circuit court should therefore be affirmed.

ALPHONSO HART,
Solicitor of Internal Revenue.

○

Office Supreme Court U. S.
FILED.
MAR 20 1890
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN D. SANBORN, PLAINTIFF in error,
vs.
THE UNITED STATES.
} No. 225.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN D. SANBORN, PLAINTIFF in error,
vs.
THE UNITED STATES.
No. 225.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In accordance with the leave of the court granted at the hearing of this case, some observations are here presented in reply to the points made in the brief of counsel for the plaintiff in error.

I.

NO ERROR WAS COMMITTED IN REJECTING TESTIMONY OFFERED BY SANBORN.

The first objection taken to the action of the court below is the allegation that error was committed in sustaining the plaintiff's objection to evidence set forth in Sanborn's first and second bills of exceptions.

The bill of exceptions shows that Sanborn called to the stand and offered to prove by one George W. Stow that during the summer of 1873 he (Stow) was employed in the office of Lucian Hawley, supervisor of internal revenue, and that he was instructed by said supervisor to call upon the executor of the Wool estate and see him in regard to the taxes due from said estate and demand payment.

To this counsel for the Government objected, and the court sustained the objection.

This ruling was undoubtedly correct, for two reasons.

First. The proposed proof did not in the remotest degree tend to show that Sanborn had anything to do with, or rendered any service in, the collection of said taxes. Stow was not Sanborn's agent, but the employé of Hawley, the supervisor.

Second. If he had been shown to have rendered service he could not claim compensation, for the reason that the law under which his contract was made with the Secretary of the Treasury did not include this claim for taxes, the same neither being due nor withheld, at the time of making said contract.

II.

THE WILL IS NOT VOID UNDER THE STATUTES OF NEW YORK.

It is contended by the plaintiff in error that certain taxes upon legacies and successions were due from the Wool estate in 1870, and prior to the death of the widow. This contention is based upon the theory that a portion of the legacies contained in the will were void under the

statutes of the State of New York against suspension of alienation and against accumulations.

The following clause in the will is relied upon as bringing the instrument under these statutes:

> The bequests following those of my wife, Sarah N. Wool, will in no case be paid or delivered until after her decease, and not until my executors can conveniently pay them, at their discretion, either in money or stocks, bonds, notes, or mortgages, without unnecessary sacrifice and without interest, no matter how long payment may be delayed.

The statutes of New York provide that the absolute ownership of personal property shall not be suspended by any limitation whatever for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a will, for not more than two lives in being at the death of the testator.

No fair construction of the will or the clause quoted above renders it void under the foregoing statutes.

General Wool, in making a disposition of his estate, had a right to give his property to whom he pleased, and to designate the manner of payment, and the time at or within which the legacies should be paid, subject only to the condition that the terms of the bequest should be reasonably certain and that there should not be an attempt to control the property beyond two lives.

The common-sense construction of the paragraph referred to is simply this:

That the legacies following those made to his wife should

not fall due until after her death, and that they should be paid within a reasonable time thereafter; and, secondly, that the business should be so managed as not to result in a sacrifice of the property. The property out of which these legacies were to be paid consisted largely of stocks and bonds, things subject to the changes and fluctuations of the market. These would have to be converted into money. In this matter his executors were authorized to exercise a sound and reasonable discretion. It was not intended that any iron rule should be in force compelling them at a certain day and hour to make the distribution, no matter what sacrifices and losses might result. The testator knew the men whom he had designated as his executors, and he had confidence in their intelligence, discretion, and judgment. It can not reasonably be inferred that anything more than this was intended.

Suppose, after his death, and the death of his widow, the executors had unreasonably withheld the payment of these legacies, and had refused within a reasonable time to distribute the estate, and account for the funds, could not any legatee from whom the legacy was withheld institute proceedings in court to compel the distribution and payment? Does anybody believe that under this will the executors could postpone the payment of these moneys beyond their own lives, or beyond the lives of the beneficiaries, and by dishonest and unwarranted delays and excuses deprive the legatees of that which was intended for them, and was by express will given to them?

It is hardly necessary, therefore, to spend time in considering the statutes of New York, or the decisions of the court of appeals, for the reason that by no fair or just

construction of the will can it be brought within their provisions.

The case of *Rose* v. *Rose*, 4 Abbott's N. Y., court of appeals, 108, referred to by counsel, when examined will be found to be wholly unlike the case under consideration; and the case of *Garvey* v. *McDevitt*, 72 N. Y., 556, utterly fails to sustain the position taken by the counsel for plaintiff in error.

III.

NONE OF THE LEGACIES LIABLE TO A TAX WERE PAYABLE UNTIL AFTER MRS. WOOL'S DEATH.

It is contended by the plaintiff in error that, regarding the will as valid, still, some of the legacies were due prior to the death of Mrs. Wool, and prior to the making of the contract with the Secretary. That portion of the will containing the codicils is relied upon to establish this fact. This leads to an examination of the will and the codicils. The first and original paper contains (besides those to the widow) bequests amounting in the aggregate to $305,500. The codicils withdraw $5,000 of one bequest (that to the Polytechnic Institute), thus reducing the bequests in the first paper to $300,500. The codicils make bequests to the amount of $53,000 more, which were subject to a legacy tax.

Taking the bequests in money and personalty, and the rate of taxation specified in the statute, it will be found that the $14,668 of tax collected was, and must have been, assessed solely upon the legacies which were to be paid in money or personalty.

After the death of the testator, and the will and codicils were proven, these papers, all taken together, constituted his last will and testament. It was not four wills, but *one* will. It was an entirety, to be taken as one instrument and so construed. It will be seen, also, that the first codicil expressly and in terms "ratifies and confirms" the original will in all respects, except so far as changed by the codicil. The second codicil makes no bequest which would be subject to any tax. The third codicil declares that "the will and first and second codicils are hereby republished and confirmed."

The clause heretofore quoted, that the bequests following those to his wife shall in no case be paid until after her decease, became a controlling provision, and applied to each and every legacy following the bequests to the wife, whether contained in the first or last instrument executed.

It applied to and was made part of the codicils, as well as to the first paper written. That is the manifest intention of the testator.

Aside from the legacies to his wife and the one providing for a monument, neither of which was subject to any tax, it was his intention to serve all the legatees alike as to time of payment. This construction must be given to the will, even though the codicils had been silent as to a re-affirmance of the original document. Authorities are abundant.

Codicils are to be regarded as parts of the will, and, together with the will, are to be considered as one instrument. (Redfield on Wills, vol. 1, p. 288; *Westcott* v. *Cady*, 5 Johns., Ch., 334.)

The codicil should be construed so as to make it harmonize with the purposes declared in the body of the will. (*Delafield* v. *Parish*, 25 N. Y., 9.)

Where the codicil professes the purpose of the testator to alter the will in one particular, it carries the implication that it was not intended to alter it in any other particular. (*Quincy* v. *Rogers*, 9 Cush., 291.)

The court in construing a will must take into view the whole instrument and give a meaning and effect to every clause. (*Gardner* v. *Wagner*, Bald., (Pa.) 454.)

A codicil is to be construed with the body of the will. (*Boyd* v. *Boyd*, 2 Fed Rep., 138; 1 McCrary, 268.)

It is the established rule not to disturb the disposition of the will further than is absolutely necessary for the purpose of giving effect to the codicil. (Jarman on Wills, vol. 1, 160.)

This being the correct law of construction, none of the legacies were due and none could have been withheld at the time Sanborn made his contract with the Secretary.

Sanborn's own conduct demonstrates that this was *his* interpretation of the will. He knew, doubtless, when Wool died, and he also knew the contents of his will, and yet the very first time he appears in any manner in connection either with the will or the estate is as shown on page 16 of the record, where it appears "that about one month after the death of Sarah N. Wool he called on Lucien Hawley for aid in the matter of collecting the tax due from the estate of John E. Wool." He knew when the tax fell due, and must have known therefore that the claim was not due and was not "withheld" at the time of making the contract with the Secretary.

IV.

SANBORN RENDERED NO SERVICE IN DISCOVERING OR COLLECTING THE TAXES, AND WAS NOT ENTITLED TO COMPENSATION EVEN IF THEY WERE DUE AT THE TIME THE CONTRACT WAS MADE.

But suppose we admit that certain portions of the legacies were actually due when the contract was made, does it help Sanborn any in the position which he takes? What was the contract he made with the Government?

It was a contract which required him to "assist the proper officers of the Government in discovering and collecting moneys belonging to the United States withheld by certain persons."

The indispensable conditions were that the moneys must belong to the United States and must be withheld, and he (Sanborn) must discover or assist in discovering, and collect or assist in collecting these moneys. He must render substantial service, so that by and through his efforts the claims would be brought to light and collected.

Did he assist in discovering the taxes on the Wool estate? Were they hid, and did he bring them to light, and were they collected by and through his instrumentality? Did he render any assistance in that behalf? No.

There was no hiding, no concealment on the part of anybody, and no discovery was required. The collector of internal revenue knew all about the provisions of the will, and stood ready to collect the taxes whenever they should fall due, and the executor, with equal knowledge, stood ready to pay them whenever they should fall due and be demanded.

As soon as Mrs. Wool died, the executor asked the Secretary of the Treasury to refer the matter of liability to an officer of the Government. It was done, and as soon as the amount was determined he paid it. Here was no concealment by anybody and no discovery, and the claim could not in any sense be brought within the class mentioned in the act of Congress allowing the employment of persons to assist the officers of Government.

The plain truth is that Sanborn made no discovery, rendered no service. By fraudulently representing to the Secretary of the Treasury that the taxes were due and withheld, he succeeded in smuggling the Wool claim into the contract with the Secretary. He then quietly waited for the death of Mrs. Wool, and soon there after appeared upon the scene for the purpose of securing one-half of the money collected from the estate. The only service he rendered was to transmit the draft for the $14,668 to the Secretary of the Treasury, and about two weeks thereafter demand and receive $7,338 for his valuable (?) efforts.

The claim for services is a mere pretense, looking at in any way you can. It was a scheme on Sanborn's part to mislead the Secretary of the Treasury, and thereby enrich himself; and the simple question now is, shall he be permitted to continue in possession of his "ill-gotten gains?"

V.

THE POSITION OF THE UNITED STATES.

The counsel for Sanborn assert that the claim made by the Government is based upon the error that nothing was due from the estate of Wool at any time, and consequently

the contract, so far as related to that estate, was null and void.

The learned counsel misapprehend the position of the Government. The contract with Sanborn was null and void, but for another and a different reason.

The claim of the Government is that the taxes on the Wool estate, whether valid or invalid, did not belong to the class of claims mentioned in the act of Congress. They were not due. They were not withheld, and should not have been included in the contract with the Secretary, and would not have been so included except for the fraud and imposition practiced by Sanborn, and the mistake of fact under which the Secretary acted in making the contract and the payment of the money, and the money having been paid on account of fraud or mistake, it can be recovered back.

Second. That even if they had come within the class of claims mentioned in the act of Congress, Sanborn did not discover, or assist in discovering, collect, or assist in the collection of these taxes. He rendered no service, and when he led the Secretary to believe he had, he misled the Secretary, and was not entitled to any compensation under the contract as made.

Third. Whether the taxes assessed and collected upon the Wool estate were legally due, at the time they were so collected in 1873, or whether they were cut off by the repealing act of 1870, is now regarded as a doubtful question. At that time the Internal Revenue Bureau held that they had "accrued" and were assessable to be paid after Mrs. Wool's death.

The courts, so far as any opinion has been rendered in

like cases, held to the same doctrine. The executor being acquainted with all the facts, came to the same conclusion and paid them without protest or objection. Being so collected and paid, the money became and is the property and money of the United States. (See the first brief for the United States and authorities there cited.)

The learned counsel of Sanborn in their brief, page 21, in speaking of this subject, say:

> He (the executor) doubtless took legal advice and was informed that on a proper construction of the will he had paid no more taxes than were legally due.

In the court below Sanborn contended that the taxes were illegally assessed on account of the repeal of the law subjecting legacies to a tax, and being so illegally collected the money did not belong to the Government, and no suit could be brought by the United States to recover them from him. Now he changes his position, and declares they were properly assessed and collected.

The Government claims that in either event, whether legally due or not, the circumstances under which the tax was collected and the money paid make it the money of the United States, and, furthermore, that Sanborn is estopped from denying it.

Counsel for plaintiff in error in their oral argument now admit that the taxes were legally assessed and collected, and that Sanborn is estopped from denying it. But they claim that the United States is estopped from denying it, and is also estopped from denying the legality and propriety of the payment of the money to Sanborn. It is a sufficient answer to say that the Government does not seek to deny the legality of the collection of the tax

from the Wool estate, and it asserts the ownership of the money. And the doctrine of estoppal can not apply to the United States in the payment of the $7,334 to Sanborn for the reason that it was done under an entire mistake and misapprehension of the facts.

VI.

THE ENTIRE TAX WAS PAID TO THE GOVERNMENT BEFORE SANBORN RECEIVED THE $7,334.

Again, it is contended that the $14,668 of tax collected from the Wool estate was never paid to the Government—never went into the Treasury; that the sum was divided, and only one-half went into the possession of the Government—and that Sanborn therefore never received the money from the United States.

The payment of taxes to an agent of the Government *for* the Government is a payment *to* the Government.

On the 1st day of August, 1873, the executor of Wool delivered to Lucien Hawley, a supervisor of internal revenue, a draft, which read as follows:

NEW YORK, *August* 1, 1873.

Pay to William A. Richardson, Secretary of the Treasury, or order, fourteen thousand six hundred and sixty-eight dollars.

ASHER R. MORGAN,
Surviving Executor of Last Will, etc., of John E. Wool, dec'd.

United States Trust Company, of New York.
$14,668.

This draft was handed to Sanborn, and by him transmitted to the Secretary on the 3d of August, 1873. On the 9th of August it was indorsed to the Treasurer of the United States, as follows:

Pay to order of F. E. Spinner, Treasurer U. S.
WILLIAM A. RICHARDSON,
Secretary.

This money was paid to the Treasurer of the United States as public moneys, and it was credited to the account of the Secretary of the Treasury, and joined the other moneys belonging to the same fund. The Secretary of the Treasury, as such Secretary, could draw against the general fund so standing to his credit for any legitimate public purpose. He had no right to draw against it for any illegitimate or improper purpose. He could pay just claims, but not unjust claims.

On the 16th day of August, a week after the $14,668 had been paid to the Treasurer of the United States, the Secretary of the Treasury paid to Sanborn $7,334 from the public funds by drawing his check upon the Treasurer.

This money being paid to Sanborn by and through a mistake of fact on the part of the Secretary, or in consequence of the fraud of Sanborn, it can be recovered back, and it is idle to expend time in discussing the question whether moneys standing to the credit of the Secretary are any less public moneys than such as have gone into the Treasury. Both are public moneys.

VII.

THE COURT BELOW DID RIGHT IN CHARGING INTEREST UPON THE CLAIM AGAINST SANBORN.

It is contended that the action could not be maintained against Sanborn except after demand made, and that no interest could be collected, and that there was error on the part of the court below, at least to this extent.

The following is a part of the closing paragraph in the brief of counsel:

> An action of *indebitatus assumpsit*, which is of itself held to be purely an equitable action, can not be maintained against a party who has innocently received money without the knowledge of any fact showing why he should not retain it, without notice or demand on him for its return. * * * Specially would he not be liable to any interest until suit brought.

Sanborn does not come within the rule, even as stated above.

He did not innocently receive the money. It was obtained through his wrong. He misled the Secretary and committed a fraud, and the court was justified in including interest in the amount of damages. Furthermore, it was a claim where the Government was entitled to interest. This is well established by authority.

In assumpsit brought for the proceeds of a cargo which was taken under legal process by the defendants in a foreign port, for the debts of the prior owners of the ship, *held* that the defendants were chargeable with interest from the time of their receipt of the proceeds. (*Ricketson* v. *Wright*, 3 Sumn. 335 [Mass].)

In equitable actions for money had and received it is within the discretion of the court to allow interest. (2d Cir. N. Y.) (*Curranee* v. *McQueen*, 2 Paine, 109.)

Interest is allowed upon the ground that the debtor is in default and has the use of claimant's money. (*Bowman* v. *Wilson, assignee*, 12 Fed. Rep., 864; 2 McCrary, 394.)

The ordinary ground of allowing interest is that a debt which is due and the payment of which is wrongfully delayed, ought justly to carry interest. (*United States* v. *Hills*, 4 Cliff., 618.)

Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of a debtor. Where, it is expressly reserved in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages it is often a matter of discretion. (*Redfield* v. *Ystalyfera Iron Company*, 110 U. S., 176.)

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. (*Young* v. *Godbe*, 15 Wall., 562.)

By the ordinary law of debtor and creditor interest is incident to the debt, and the obligation to pay it is implied. (*Wightman* v. *United States*, 23 C. Cls. R., 148.)

An action for money had and received lies whenever money has been received by the defendant which belongs to the plaintiff. (*Tutt* v. *Ide*, 3 Blatch., 249; *Allen* v. *McKeen*, 1 Sumn., 276.)

When an illegal tax has been collected and it is recovered back, interest is allowed from the date of illegal exaction. *Erskine* v. *Van Arsdale*, 15 Wall., 77.)

Interest is allowed on taxes sued for from the time they became due and payable. (*United States* v. *Erie Railway*, 106 U. S., 330.)

VIII.

The learned counsel, in their brief, refer on pages 26 and 27 to the ruling of Mr. Justice Benedict in a criminal proceeding against Sanborn.

No information is given by counsel as to the book or page in which this opinion can be found, and an examination of Benedict's reports fails to disclose it. It is possible that such a decision was rendered.

It was made, however, if at all, in a case where Sanborn was charged, under his contract with the Secretary of the Treasury, with swindling the Government. It will hardly be contended that Sanborn was entitled to one-half of all moneys discovered and collected by other officers of the Government and with which he had nothing to do, simply because he by fraud and misrepresentation had succeeded in getting them included in his contract, and the fact that the Government failed in convicting and sending him to the penitentiary for his crimes is hardly sufficient to avail him as a defense when he is called upon to disgorge the money improperly obtained.

ALPHONSO HART,
Solicitor of Internal Revenue.

MARCH 25, 1890.

Office Supreme Court U. S.
FILED.
MAR 21 1890
JAMES. H. McKENNEY.
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1889.

No. 225.

JOHN D. SANBORN, *Plaintiff in Error*

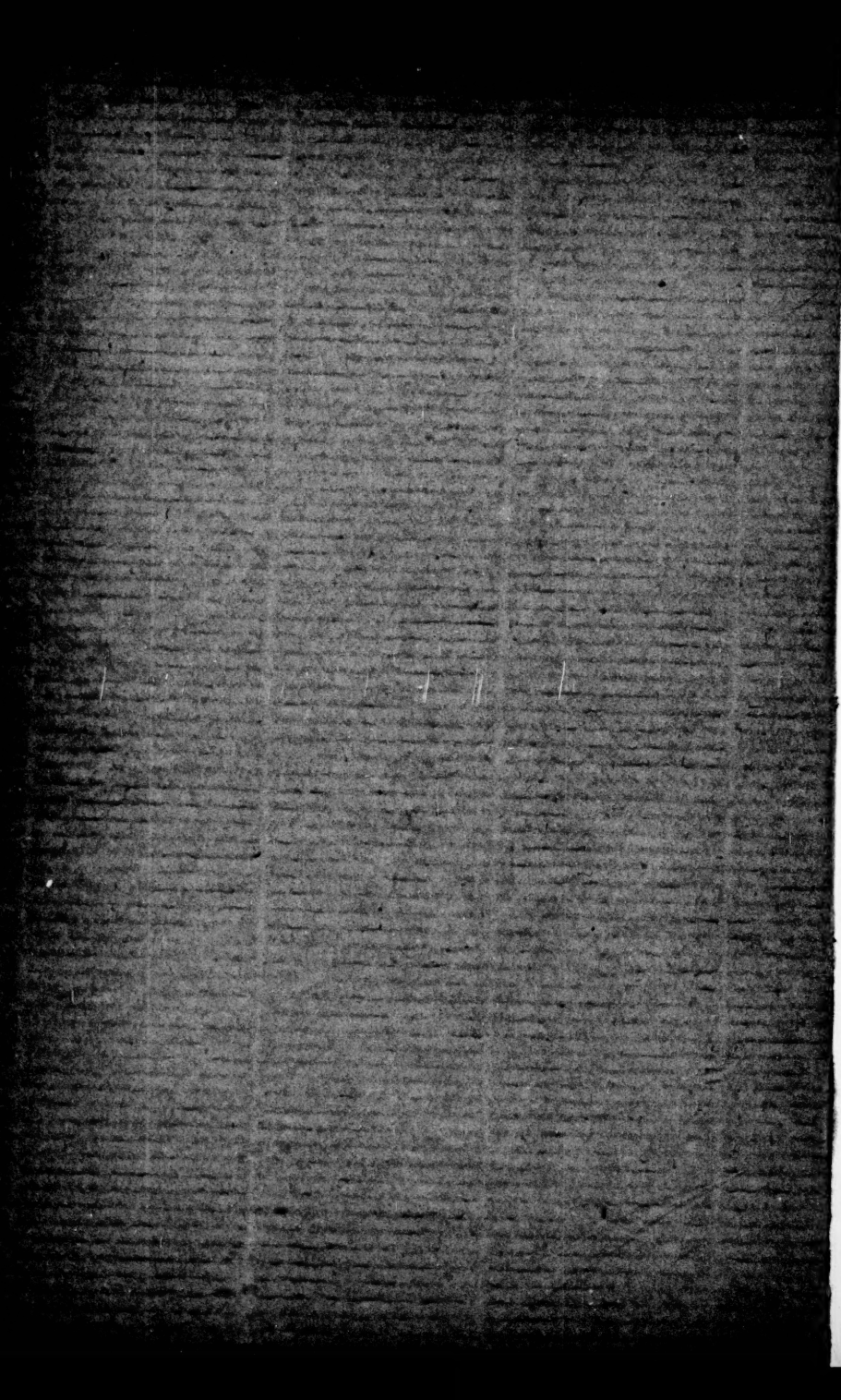
vs.

THE UNITED STATES.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

BENJ. F. BUTLER,
O. D. BARRETT,
of Counsel.

R. O. Polkinhorn, Printer, 632 and 634 D Street.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN D. SANBORN,
Plaintiff in Error,
vs.
THE UNITED STATES.

No. ~~224~~ 5

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Case.

This is an action brought by the United States against John D. Sanborn, the plaintiff in error, to recover seven thousand three hundred and thirty-four dollars, with interest from the 16th day of August, 1873, for moneys on that day to him paid by the Secretary of the Treasury, the United States now claiming that the same was paid to him without authority of law.

Said Sanborn had entered into a written contract with the Secretary of the Treasury, under an Act of

Congress approved on the 8th day of May, 1872, (17 U. S. St., 69,) to assist the proper officers of the Government in discovering and collecting certain moneys belonging to the United States which had been withheld by certain persons, among whom named in the contract was the estate of John E. Wool (R., p. 7.)

By the terms of his contract he was to receive a commission on the collections so made, to be paid to him out of the proceeds of the collection. He performed his part of said contract in collecting the internal revenue succession and legacy taxes on said estate, and the same having been received through said Sanborn by the Secretary of the Treasury, he, the Secretary, out of the proceeds of the draft with which the tax was settled, paid to Sanborn his commission in strict conformity with the terms of said contract, in full payment and satisfaction of his services rendered in the collection of said taxes.

The Act of Congress above referred to authorized the Secretary of the Treasury—

"To employ not more than thee persons to assist the proper officers of the Government in discovering and collecting any moneys belonging to the United States whenever the same shall be withheld by any person or corporation, upon such terms and condition as he shall deem best for the interest of the United States; but no compensation shall be paid to such person except out of the money and property so secured, and no person shall be employed under the provisions of this clause who shall not have fully set forth in a written statement, under oath, addressed to the Secretary of the Treasury, the character of the claim out of which he proposes to recover, or assist in recovering moneys of the

United States, the laws by the violation of which the same have been withheld, and the name of the person, firm or corporation having thus withheld such moneys." (17 Stat., 69.)

On the 15th day of July, 1872, (R., p. 4) Sanborn submitted a written statement, under oath, addressed to the Secretary of the Treasury, calling his attention to certain claims out of which he proposed "to recover, or assist in recovering moneys of the United States for evasions of the law and frauds upon the laws for collection of Internal Revenue Tax, upon spirituous liquors, as well as in making false returns of the amounts manufactured as in evading the payment of the tax upon them which *is* returned;" and he appended thereto a schedule of the names of the persons and firms, which had thus withheld such moneys and the probable amount thereof.

On this statement Sanborn asked to be employed, and subsequently, on the 13th day of August, 1872, a contract in writing was made between the acting Secretary of the Treasury and said Sanborn, which contract is fully set out in the record, commencing on page 5.

On the 25th day of October, 1872, said Sanborn made to the Secretary an additional statement under oath of other claims out of which he proposed to recoved or assist in recovering moneys of the United States, giving the names of the persons, or firms having withheld such moneys, and specifying the character of the claims.

To this statement was added a "request that the foregoing cases may be brought under my contract with the Secretary of the Treasury, bearing date, August 13th, 1872."

Among the names so given, is that of the estate of John E. Wool, (R., p. 6.)

On the 30th day of October, 1872, said Sanborn's said contract of August 13th, 1872, was so extended as to include, amongst others, the claim against the estate of said John E. Wool. (R., p. 6.)

On the 3d day of February, 1873, the Secretary of the Treasury signed and issued a circular, of which the following is a copy:

TREASURY DEPARTMENT,
February 3, 1873.

SIR: You are requested to assist John D. Sanborn, Esq., of Boston, in the examination of official records in reference to such cases of alleged violation of the Internal Revenue Laws, as he may ask for your co-operation.

Mr. Sanborn is acting under an appointment under me and may need some information from the officers of collection and assessors for the purpose of verifying his claim.

Very Respectfully,
GEORGE S. BOUTWELL,
Secretary of the Treasury.

To Supervisors and Collectors of Internal Revenue.
(R. p. 718).

On the 15th day of Oct. 1873, the Secretary of the Treasury signed and issued another circular of which the following is a copy:

TREASURY DEPARTMENT,
October 15th, 1873.

To Supervisors and Collectors of Internal Revenue.

You are requested to assist John D. Sanborn, of Boston, in the examination of such cases of alleged violations of the Internal Revenue Laws, as he may ask for your co-operation.

Mr. Sanborn is acting under an appointment from the Treasury Department, and may need some aid and information from your district for the purpose of verifying his claim.

Please render him such assistance as he requires.

Very Respectfully,

WILLIAM A. RICHARDSON,

Secretary of the Treasury

John E. Wool, died at Troy New York, Nov. 10th, 1869.

His will was admitted to probate Feb. 8th, 1870.

Letters testamentary, under said will were issued to John A. Griswold and Asher R. Morgan, on the 4th day of March 1870.

On the 31st day of Oct. 1872, John A. Griswold died and thereafter said Morgan acted as sole executor.

Sarah N. Wool, the widow of John E. Wool, died on the 7th day of May, 1873.

Gen. Wool left a very large estate, and by his will he devised his homestead to his wife for life, bequeathed to her for life the use of much personal property and also bequeathed to her an annuity for life of $10,000 per annum, and $20,000 to her in absolute right.

Following these bequests to the wife, there is a large number of other bequests made to various relatives, friends and servants, and a devise of one house and lot to his servant, James H. Davis, for his life on condition that he remain in the service of the General's wife during her life.

To most of the bequests following those to his wife are added the words, "to be paid after the decease of Mrs. S. N. Wool."

After giving directions as to the payments to be made to his wife the testator adds the following:

"The bequests following those of my wife, Sarah N. Wool, will in no case be paid or delivered until after her decease, and not until my executors can conveniently pay them, at their discretion, either in money or stock, bonds, notes or mortgages, without unnecessary sacrifice and without interest, no matter how long payment may be delayed."

"All my personal estate, beyond what may be requisite to meet the payment of the bequest of my wife, Sarah N. Wool, will, as far as practicable, be securely invested on interest, which will be added to that intended for the payment of the bequests authorized by the will." (Rec., p. 12.)

And the rest and residue of his personal property he bequeathed to three nieces, then naming his executors, and bequeathing to such of them as might qualify and serve, $5,000 each; he signed and published his will.

Later he adds three codicils, in the last of which he bequeaths over $30,000 to different legatees, without any restriction as to when said legacies should be paid; and then devised to his servant, James H. Davis, mentioned in his will, the house and lot in which he had previously given him a conditional life estate.

The will contained no residuary clause as to the General's real estate, and there is nothing in the record to show the amount or the value of the real estate owned by the General at the time of his death.

John T. Masters was Collector of Internal Revenue, and his district included Troy, N. Y., in which city Wool resided at the time of his death.

He knew of the General's death at the time it occurred, knew that he left a large estate, that he left a will, and knew the provisions of the same, and knew of the death of Sarah N. Wool, at about the time it occurred. (R., p. 14.)

Lucian Hawley was Supervisor of Internal Revenue in New York. (R., p. 15.)

Within a few weeks after the death of Sarah N. Wool, said Morgan wrote to the Secretary of the Treasury asking him to refer the question of succession and legacy tax on the estate of said John E. Wool, to some person in authority to pass upon the liability of said Morgan, to pay taxes on said estate, and before the 31st day of July, 1873, he received a letter from the Secretary of the Treasury referring all questions relating to said matter to Lucian Hawley, Supervisor of Internal Revenue. Said Morgan subsequently had several consultations with said Hawley relating to said taxes. (R., p. 15.)

The plaintiff in error, about one month after the death of Sarah N. Wool, the widow of said John E. Wool, called on said Lucian Hawley, Supervisor of Internal Revenue as aforesaid, for aid in the matter of collecting the tax due from the estate of John E. Wool, deceased. (R., p. 22.)

On the trial of this cause in the court below, one of the witnesses for the United States, on cross-examination, gave evidence tending to prove that two men claiming to be employees in the office of Lucian Hawley, Supervisor (of Internal Revenue) as aforesaid, sometime after the death of Sarah N. Wool, widow of John E. Wool, deceased, called on John T. Masters, Collector of Internal Revenue, at Troy, N. Y., and had a conversation with him in relation to

the Internal Revenue taxes due to the United States on the estate of John E. Wool, deceased, and that on the 31st day of July, 1873, and not before, said Masters took his first step towards enforcing the collection of said taxes.

During the summer of 1873, George W. Stow was employed in the office of said Lucian Hawley, Supervisor of Internal Revenue in New York,

On the witness stand said Stow was asked by the defendant Sanborn, to state what, if anything, he did under the instruction of said Supervisor Hawley, in the collection of the Internal Revenue taxes due the United States from the estate of John E. Wool, deceased.

This question was objected to by the United States, and the objection was sustained by the court and an exception allowed to defendant, Sanborn. (R., p. 22.)

Thereupon, defendant Sanborn made the offer to the court of evidence by the witness George W. Stow, tending to prove that immediately subsequent to the defendant calling on Lucian Hawley, Supervisor as aforesaid, for aid in collecting the Internal Revenue taxes from the estate of John E. Wool, deceased, he, the said Stow, under the instruction of said Hawley, called on said Asher R. Morgan, executor as aforesaid, and demanded payment to said Hawley, Supervisor as aforesaid, of said taxes, and that subsequently said Morgan called upon said Hawley in pursuance of such demand, made by said Stow, and arranged with said Hawley for the payment of said taxes, and paid the same by check as aforesaid, to said Hawley on the 1st day of August, 1873.; and further, that he, said Stow, in company with another

employee in the office of said Hawley, did, prior to the 30th of July, 1873, call upon John T. Masters, collector of Internal Revenue at Troy, N. Y., under instructions from said Hawley, and had a conversation with said Masters in relation to the collection of the Internal Revenue taxes due to the United States from the estate of John E. Wool, deceased.

To this offer of evidence the United States objected, the Court below sustained the objection and an exception was granted the defendant.

On the 31st day of July, 1873, John T. Masters, wrote a letter to said Asher R. Morgan, reminding him that "No return has been made to me of the legacies and distributive shares of the estate of the late Gen. John E. Wool," and asking him to make a return of the legacies, distributive shares or succession and all other facts required by law. (R., p. 14.)

On the 12th day of July, 1873, J. W. Douglass, Commissioner of Internal Revenue, addressed a letter to T. J. Cram, of which the following is a copy:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, 12 *July*, 1873.

SIR: T. J. Cram, of 1817 De Lancey Place, Philadelphia, Pennsylvania, writes:

"Maj. Gen. Wool, U. S. A., died Nov. 10, 1869, (in Troy N. Y. his residence), leaving legacies of $4,000 each to my wife and myself. But there was a condition in the will forbidding his executors from paying any legacies until after the death of his wife. * * * Mrs. Wool died 6 May last.

"The executor proposes to retain from the legacies U. S. tax of 6 per cent. on payment 18 inst. of the legacies, &c." There is nothing in the statement

above to show that the said legacies are not subject to tax, but the same would appear to be liable, as indicated in "Circular 86." (See p. 30, "Series 6, No. 1.")

Very respectfully,

JOHN W. DOUGLASS,
Commissioner.

J. T. MASTERS, Esq.,
Collector,
Troy, N. Y., (R., p. 15.)

On the 1st day of August, 1873, said Morgan delivered to Lucian Hawley, Supervisor of Internal Revenue, in payment of the taxes due from the estate of Gen. Wool, a draft of which the following is a copy:

(2 cent internal revenue stamp, cancelled.)

NEW YORK, *Aug't 1st*, 1873.

Pay to William A. Richardson, Sec. of Treasury, or order, fourteen thousand six hundred and sixty-eight dollars.

ASHER R. MORGAN,
Surviving executor of last will, &c., of
John E. Wool, dec'd.

UNITED STATES TRUST COMPANY OF NEW YORK.
$14,668. (R., p. 15.)

On or about the 1st day of August, 1873, said Hawley delivered to said Sanborn said draft, and on the 3d day of August said Sanborn enclosed said draft to the Secretary of the Treasury, which said draft on presentation to the United States Trust Company was duly paid and the proceeds of the same were returned to the Secretary of the Treasury, who thereupon on the 16th day of August, 1873, drew his draft in favor of said John D. Sanborn for sixteen thousand one dollar and thirty-four cents on the

Treasurer of the United States, and forwarded the same to said Sanborn, who received said draft, endorsed it, presented it for payment, and received payment thereof, of which seven thousand three hundred and thirty-four dollars was on account of his said commission in the collection of said legacy and succession tax on the estate of John E. Wool.

Said taxes on the estate of Gen. Wool were paid by the executor without protest, and no demand up to the time of the commencement of this suit had ever been made by the executor upon any party to refund the same, and prior to the commencement of this suit no demand was made on Sanborn to refund to the United States the moneys claimed in its declaration.

The case was heard by the court, trial by jury having been duly waived in writing. (R., p. 3.)

The court found the facts substantially as above set forth, but specifically as set forth in the record, pp. 4–19.

And on said facts the court further found that the plaintiff was entitled to recover the full amount of its claim. (R., p. 19.)

Assignment of Errors.

1. The court below erred in sustaining the plaintiff's objection to defendant's asking the witness, George W. Stow, what, if anything, he did under the instructions of supervisor of internal revenue, Lucien Hawley, in the collection of the internal revenue taxes due the United States from the estate of John E. Wool, deceased, as set forth in defendant's first bill of exceptions. (Rec. p. 22.)

2. The court below erred in sustaining plaintiff's objection to defendant's offer of evidence, by the witness George W. Stow, tending to prove that he, Stow, under the instruction of supervisor Lucian Hawley, called on Asher R. Morgan, executor of the last will and testament of John E. Wool, deceased, and demanded payment to said Hawley, supervisor as aforesaid of said taxes, and that subsequently said Morgan called on said Hawley in pursuance of such demand made by said Stow, and arranged with said Hawley for the payment of the succession taxes on said estate, by check to said Hawley on the 1st day of August, 1873; and further that he, said Stow, in company with another employee, in the office of said Hawley did, prior to the 1st day of July, 1873, call upon John T. Masters, collector of internal revenue at Troy, N. Y., under instructions from said Hawley, and had a conversation with said Masters, in relation to the collection of the internal revenue taxes due to the United States, from the estate of John E. Wool, deceased, as fully set forth in defendant's second bill of exceptions. (Rec. p. 22.)

3. The court below, on the facts found, erred in finding as matter of law that the plaintiff is entitled to recover in this action a judgment against the defendant.

4. The Court below erred in allowing interest for time prior to commencement of suit, without any proof of prior demand.

Points and Authorities.

I.

The court below erred in sustaining the plaintiff's objection to evidence set forth in defendant's first bill of exceptions, and in sustaining the plaintiff's objection to defendant's offer of evidence set forth in his second bill of exceptions.

It is evident from the record that the plaintiff was trying to make it appear that the tax in question was collected entirely independent of anything done by Sanborn, and independent of anything done by Supervisor Hawley at the instance of Sanborn.

It was the right of the defendant to put in evidence not only what he did in person, but also to put in evidence all that was done at his instance, as well as to have fully explained who were the two men in plaintiff's evidence (R., p. 21,) who called on John T. Masters and had a conversation with him concerning the collection of the taxes in question; who sent them what instructions they had, and what transpired between them and said Masters, in order that the findings of fact might be found in full in respect to the collection of the tax in question.

This is important as completely controlling one part of the Government's contention that the collection was made without any aid whatever of defendant Sanborn, and to end their contention of wrongdoing on the part of Hawley in turning the draft for said taxes over to Sanborn.

II.

Certain succession and legacy taxes were due and payable from the estate of John E. Wool, as early as May, 1870.

Sec. 125, of the act of June 30, 1864, as amended by the act of July 13th, 1866, c. 184 (14 U. S. Stats., 140), provides that the legacy tax "shall be due and payable whenever the party interested in such legacy or distributed share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom," &c., and the executor, administrator, or trustee, having charge of the property, is required, within 30 days after he shall have taken charge of the trust, to give notice thereof, to the assessor of the District in which the deceased last resided.

A careful examination of the will of Gen. Wool will show that the great bulk of his estate legally vested in possession and enjoyment immediately after his death, and as a consequence, became subject at that time to the payment of the tax which was subsequently collected; and this vesting in possession and enjoyment occurred long prior to the supplemental contract between the Secretary of the Treasury and Sanborn, which brought the collection of that tax within the terms of his original contract.

1. Because all of the bequests made in the third and last codicil were made without any restriction as to the time within which they were to be paid, and were consequently payable by the executor as soon as he had qualified, which was in March, 1870.

2. Because all the bequests in the will, other than those made to Mrs. S. N. Wool, and those made in said third and last codicil, are within the Statute of N. Y., against suspension of alienation and are also within the Statute of N. Y., against accumulation.

We will now proceed to show how said legacies are within those statutes.

The provision of the will is that the personal estate, except that bequeathed to the widow, shall "be securely invested on interest, which will be added to that intended for the payment of the bequests authorized by the will"; and the direction as to payment is as follows:

> "The bequests following those of my wife, Sarah N. Wool, will in no case be paid or delivered until after her decease, and not until my executors can *conveniently pay them at their discretion*, either in money or stocks, bonds, notes, or mortgages, *without unnecessary sacrifice*, and without interest, *no matter how long payment may be delayed.*"

We respectfully submit that the provisions of the will in question taken together do, in effect, vest the personal property in the executor, with directions to securely invest the same on interest, adding the interest to the corpus of the estate, and then at such time after the death of Mrs. S. N. Wool, as the executor will find it convenient, to distribute said personal property, and at such time as he may be able to do it without *unnecessary sacrifice*, however long that may be, he shall make the distribution according to the terms of the will.

We submit that these provisions constitute under the law of New York a perpetuity.

The law of New York against perpetuities makes all dispositions of property void which *must not vest* within or on the termination of two lives in being, without any additional period whatever; and the courts hold that no period of time definite or indefinite can be made use of as a substitute for life or lives.

In the case of *Rose, executor*, vs. *Rose et al.*, N. Y., , determined by the Court of Appeals in October, 1863, the testator gave a large estate, valued at $1,000,000, to executors to aid in founding a benevolent association, if within five years from his decease $300,000 should be raised from other sources. If that sum should not be raised within the specified time, then the estate was to go over, one-half to the American Colonization Society and the other half to other benevolent objects. It was held that the primary limitation was void as a perpetuity and that the same was fatal also to the secondary bequests.

General Wool having mentioned but one life (that of his wife) in being, the period cannot be extended beyond that one life. He might have named two lives in being, but he did not do it.

The provisions of the will above referred to tie up the estate during the entire period permitted by the law, to wit, the life of Sarah N. Wool, and further tie it up for an indefinite period depending—

1. On the condition in which the estate may be at some future time; and,

2. On the *convenience* and *discretion* of the executor.

Two things, neither of which could be exercised by him until the estate had by time and accumulation become such that distribution could be made without "*unnecessary sacrifice.*"

During all this period the executor cannot sell the estate, for it must remain in him until it is in condition to be distributed. Neither can the legatees sell it, for it will not be their's to sell. Nor can the legatees and the executor conjointly sell the estate until the time when it might be distributed. And that indefinite period commences with the death of Sarah N. Wool, and might extend for fifty years or more.

It follows that the parts of the will we have been considering are void as within the statute of New York against perpetuities.

That such is the construction given to wills, similar to the one in question, by the courts of New York see the opinion of the court in the case of *Harris* vs. *Clark*, 7 N. Y., 242.

Not only are the provisions above referred to of the will in question void as within the law as against alienation, but they are also void as within the New York statutes against accumulations.

In this case the accumulations are to be added to the corpus of the estate and go to make up the bequests, and there is no provision in the will limiting the time during which these accumulations are to accrue save the point of time, in the future, when the estate shall have been brought into such condition that a distribution could be made without unnecessary sacrifice of the estate; and there is no provision devoting those accumulations to minors.

The law of New York on this subject is as follows:

IV. Revised Stat. of New York, Title 4, p. 2516.

Sec. 3. An accumulation of the interest of money, the produce of stock or other income or profit arising from personal property may be directed by any instrument sufficient in law to pass such personal property, as follows:

1. If the accumulation be directed to commence from the date of the instrument, or subsequent to the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority.

2. If the accumulation be directed to commence at any period subsequent to the instrument or subsequent to the death of the person executing such instrument, it must be directed to commence within the time allowed in the first section of this title for the suspension of the absolute ownership of personal property, and at some time during the minority of the person for whose benefit it is intended, and must terminate at the expiration of their minority.

Sec. 4. All directions for the accumulation of the interest, income or profit of personal property other than such as are herein allowed shall be void.

Garvey vs. *McDevitt*, 72 N. Y., 556.

In this case the testator orders and directs his executors, at the expiration of four years after his decease, to sell his real estate at public or private sale, and pay over the proceeds to the Bishop of Raphoe upon the trusts mentioned; and until the same, he orders and directs his executors to rent the real estate, and after paying all taxes, assessments, water rates, insurance, and other charges thereon, to de-

posit the balance of the rent received in a savings bank, and then to pay the money thus deposited, with the residue of his personal estate and the proceeds of the sale of his real estate, to the Bishop of Raphoe upon the trusts mentioned.

Now assume that the period at which, under the provision of the will in question, a distribution could take place "without necessary sacrifice to the estate would be determined at the end of four years from the death of Mrs. Wool, then the will in question would differ from the one considered by the New York court in the case of *Garvey* vs. *McDevitt*, in three particulars only:

1. The will in question relates to personal property. The will considered by the New York court related to real property; but the laws governing in this respect are the same.

Hawley vs. *James*, 8 Paige, p. 458.

2. The will in question purports to vest in the legatees the property absolutely, while the will before the New York court vested it in a bishop in trust.

3. The period of time in the will in question begins to run at the end of a life in being, in the other case it began to run at the death of the testator; but this difference has no effect upon the legality or illegality of the provision of the will in question.

The New York court held that the trustee could not alienate during the trust term; and further, that the beneficiary could not alienate it during that term, and the court concludes "there is, therefore, a suspense of the power of alienation not limited by life," and hence the trust is void.

The will does not purport to dispose of all the testator's real estate. It contains no residuary clause as to the real estate and contains no preliminary statement showing any intention to dispose of all his real estate. On the contrary, the will, not including codicils, disposed of one piece of real estate conditionally to James H. Davis for life, and left the remainder intestate property. It also gave the homestead to Mrs. Wool for life, with remainder conditionally to her nephew in fee. But if the nephew failed to comply with the conditions, then the remainder of the homestead, after the life estate of Mrs. Wool, would be intestate property.

The third codicil disposed of the remainder in the real estate willed to Davis, but left a chance for the homestead to descend after Mrs. Wool's death as intestate property.

There is nothing in the will and nothing in the record to indicate the value of real estate or the quantity thereof, owned by Gen. Wool at the time of his death, and consequently, so far as this case is concerned, the matter is absolutely unknown.

For aught that appears in the record, Gen. Wool may have left an immense amount of real estate to descend as intestate property, on which succession taxes were due from near the time of his death.

It may seem a little remarkable to the Government officers, on their theory, that the tax paid by the executor has never been redemanded by him.

As the law makes provision for refunding all taxes illegally collected, it was his bounden duty, as an executor, if this tax was illegally collected, to apply for the refunding of the same, and he could be held

responsible to the legatees under the will or some of them for failing to do his duty in that behalf.

But a careful examination of the will, showing that nearly all the legacies therein provided for, were void and that among those legacies were several very large ones to this same executor and his family, it is not at all strange that he should neglect to institute any proceeding which might result in a decision that the property willed to him belonged to another.

He doubtless took legal advice and was informed that on a proper construction of the will he had paid no more taxes than were legally due.

III.

The claim made by the Government is based on the error that nothing was due from the estate of John E. Wool, deceased, at any time, and consequently the contract so far as it related to that estate was null and void.

We have above shown the error of the ~~appellee,~~ defendant in error showing conclusively that there was at that time a large amount due the Government, which had been withheld, for more than two years.

But the question will probably be raised that a portion of the estate was not liable to taxation for internal revenue purposes at the time of the making of said contract. And that consequently any moneys collected on that part of the estate were not within the Sanborn contract.

To this we say, that there is nothing in the case to indicate on what part of the estate the taxes collected were paid.

For ought that appears the executor may have paid the entire tax on portions of the estate which were liable and subject to the payment of tax in 1870; and so long as the burden of proof is on the Government, it follows that until the Government is able, by a preponderance of evidence, to prove that some of the moneys collected were collected from parts of the estate exempt from taxation, the court must act upon the theory that Sanborn did his duty and that the executor paid only such moneys as he was legally bound to pay.

But assume that a part of the moneys paid were paid on parts of the estate not subject to the tax at the time of payment in question.

We are then met by the question what part was so paid; and as the Government, on whom the burden of proof rests, has not shown that part, its suit must fail.

But if a portion of the taxes paid by the executor were collected by Sanborn, without authority of law the Secretary of the Treasury having received the money, adopted his act which was one within the scope of his authority, that is, he was fully authorized to collect a portion of that money. But in paying it to him the executor paid some in excess of what he was under obligation to pay.

Sanborn was therefore acting within the scope of his authority, and the Government adopted his act, received the money, and when after the decision of this court in the case of *Mason* vs. *Sargent*, 104 U. S., 689, the Government officials for the first time found the possibility that any money having been paid over above the amount required by law, it did not refund the money to Sanborn, nor to Morgan, but held on to it and still holds on to it claiming that it is money of the United States.

This brings the case within the decision of the Circuit Court in the suit of the *U. S.* v. *Collier*, 3 Blachford, 325, in which a collector without authority of law collected in California, certain customs dues, duly accounted for the same to the United States and retaining what he would have been entitled to had he been legally and formally appointed collector for the time during which he made the collections, and seizures in dispute.

The United States, as in this case, adopted what he had done—attempted by suit to deprive him of all compensation on the ground that he had been acting without authority of law.

As this is the only case in the books to be found like the present one, we quote from it as follows:

"The plaintiffs, by adopting the acts of the defendant between September 28th, 1850, and January 14th, 1851, as official and as within his legal competency, have sanctioned them, and rendered them valid, in so far as the claims arising therefrom in favor of the defendant and against the United States are concerned." * * * "But, whether this be so or not" (*i. e.*, whether there was or was not any law authorizing of any person to act as collector during the period named,) "we think that in a transaction between the Government and the collector, touching the adjustment of his accounts, the plaintiffs, by continuing an account with him as an officer duly acting under the law of 1849, have ratified these acts, and are concluded from denying his claim for a proper compensation therefor."

NOTE.—In 1849, March 3, Upper Cal. was made into a collection district, the revenue laws extended over it, and a collector was appointed. All this was changed by act of Congress dividing Upper Cal. into six collection districts, providing for collectors in each, but making no provision for the continuance of the first arrangement, till the second could be put into effect. The second arrangement was put into operation January 1, 1851. It was contended that the old collector was without authority to act for the period between Sept. 28, 1850, and Jan. 1. 1851.

"This action is prosecuted to recover from him moneys collected officially and retained by him to cover credits which he claims in his character of collector; and the plaintiffs, under the facts, might be held, after so dealing with him, to be concluded from denying that he was collector *de facto* and *de jure*, under the act of 1849, until the time when his office was transferred to a new officer on the 14th of January, 1851, and that he is entitled to compensation until that period, conformably to the provisions of the act of March 3rd, 1849.

"The plaintiffs establish no legal title to the moneys demanded, except in subserviency to that principle. The Treasury transcript would be nugatory as to all doings of the defendant out of office, and could afford no foundation for the recovery of a debt incurred by him after the passage of the act of Sept. 28, 1850. * * * *

"And it matters not, to the just determination of this cause, whether the decision be placed upon the ground that the act remained in force to this end, as between these parties, or whether a proportionate part of the salary of $1,500, together with the fees and commissions which accrued between September 28, 1850, and January 14, 1851, be adopted as measuring the *quantum meruit* of his services."

V., p. 343.

Collier seized certain liquors as forfeited under the revenue laws, instead of having them forfeited by judicial proceedings, which at the time were impractical, he sold the liquors and after paying all expenses the net proceeds amounted to $69,830.36, of which he claimed one half.

On p. 345, the court say:

"In this posture of the case it is not easy to produce any rule of law or equity which will enable the plaintiffs to disavow, at an after period, their approval of those acts, and hold the defendant re-

sponsible to them for the entire avails of the property. Nor are we satisfied that the United States acquired such title to the moiety retained by the defendant, as to enable them to maintain an action for its recovery against him."

"That is, he had made his returns of sales to the Treasury. The Treasury Department had accepted them without objection, and the case shows, moreover, that 'the Treasury adopted and ratified, so far as it was competent' for that department to do so, the 'acts of the defendant in that behalf.' " (p. 345.)

"The proceedings by the Secretary of the Treasury to restore those proceeds to the owners of the liquors after this suit was commenced, could not divest the right and title of the defendant to the one moiety which had been for a long period in his actual possession, and was received as between him and the plaintiffs in a manner tantamount to that of a formal distribution of the proceeds after condemnation by order of court." (p. 346.)

"In our opinion, therefore, if the award of these moneys by the Secretary of the Treasury to the owners of the liquors seized had been strictly in the form of a remission, under the authority of the first section of the Act of March 3d, 1797 (1st U. S. Stats. at Large, 506), it would be inoperative and void as to the defendant, after the moneys had publicly gone into his hands, and were held as his own property." (p. 346.)

IV.

Said taxes having been collected under the construction of the Internal Revenue Laws as held by the officers of the Government at the time of their collection, a subsequent change of construction given by this court, many years afterwards, cannot vary the rights of Sanborn in the matter.

As to what was the construction of the law at the time by the Treasury official, is fully and conclusively shown by the letter from Commissioner Douglass to J. D. Masters. (R., p. 15.)

It is the duty of all subordinates to the Secretary of the Treasury to take the law in the discharge of their duties as interpreted by the proper officers of that department.

It would result in nothing but confusion to hold that each subordinate must know the law and must at his peril for himself, independent of his superiors, construe it, as this Honorable court may at a long interval afterwards, on a proper case, construe the law.

True, it is a fiction of law that no man can excuse himself through ignorance of it; but this, like all other rules, has its exceptions, and one of those exceptions is, that government subordinates must take and execute all laws relating to civil affairs in accordance with the construction given them by their superiors.

Upon the theory of the Government, that Sanborn took no part in the collection of the money in question, either directly or indirectly, still it was the duty of Supervisor Hawley to deliver to Sanborn the draft, inasmuch as the collection of all taxes from that estate were included in Sanborn's contract; his right accruing by virtue of the information communicated by him to the Secretary on which the contract was based.

Upon this point we quote the opinion of Mr. Justice Benedict, delivered by him in a criminal proceeding under this same contract.

We extract from the opinion the following:

"Being thus called upon to determine the legal effect of the contract made with Sanborn, I have examined its provisions. The result of my examination is the conclusion that the contract which Sanborn obtained does not limit his right to a portion of such of the taxes therein named as might be collected by means of his aid thereafter rendered; but that upon the execution of the contract Sanborn acquired a right to recover upon the collection of the taxes included in his contract, the stipulated portion of such taxes, however, and by whomsoever collected."

"The contract was claimed by Sanborn and awarded by the Secretary of the Treasury upon the ground that Sanborn had already discovered the indebtedness to the United States of the parties named, and that these taxes were being withheld."

"It, in express terms, confers upon Sanborn the right to collect the taxes due from parties designated by name, and it then expressly declares that whenever any money shall be collected from the persons named, either by legal proceedings, conducted by the proper United States Attorney or by settlement as compromise of such claim, there shall be paid to Sanborn out of such money as fast as collected, 50 per cent. of the amount, which is nowhere in the contract described as compensation for services to be rendered in the collecting of the indebtedness which was taken to have been discovered by Sanborn."

"Such a contract does not support the averment in the indictment and with such a contract. I am of the opinion that the prosecution must fail."

"The theory upon which this indictment is found, depends upon a misconception of the scope and effect of the contract, and the error seems fatal to the charges in this indictment."

Congress, by providing in the Act of May 8th, 1872, for the payment of expenses of collection by the Secretary out of the moneys collected before any

of them could reach the Treasury, imposed upon the Secretary a duty which might have been imposed upon Supervisor of Internal Revenue in New York, or on any other officer connected with the Internal Revenue Service, and to that extent made the Secretary an agent in the matter of the collection.

If the United States had no claim to the money collected from the Wool estate, at and before the time of its collection, it could not acquire any legal title to any part of it, save so much as was paid in the Treasury of the United States, and remained there until by limitation, all right to reclaim it under the law, had been lost to General Wool's executor.

The very fact that the law provides for its reclamation shows conclusively that it was not the intent of Congress that any moneys paid as such taxes under mistake of law or fact should, in consequence of such mistake, vest the title in the United States.

In this case the entire collection passed through Sanborn to the Secretary of the Treasury, by whom it was divided into two equal parts, one of which went back to Sanborn and the other into the Treasury.

Suppose that, under the provisions of the law, Wool's executor had been the party to divide the money, paying one-half to the Secretary of the Treasury to go into the Treasury, and the other half to Sanborn as costs of collection, would such procedure change in any way the legal title to the money? And under such procedure could the government prove such title to the money thus paid to Sanborn as to enable it to maintain an action as for money had and received against him for the share paid to him in the case supposed? It is respectfully sub-

mitted that if the action could not be sustained in the one case, it could not in the other.

And a judgment in favor of the United States against Sanborn, for such money fully satisfied, would be no bar in his favor to a suit by Wool's executor against him for the same money, which suit doubtless could be maintained, if there were no taxes due, at the time of the collection.

Upon the theory of the Government that nothing was due from the Wool estate, several consequences result :

I. If the estate of Gen. Wool never owed a dollar to the Government of the moneys collected, Sanborn never received a dollar belonging to the United States.

II. There is no act of Congress vesting the title in the money in question in the United States between the time it was paid by the executor and the time when a moiety of the same was received by Sanborn through the Secretary.

III. There is not now, and there was not at the commencement of this suit, any secondary liability on the part of the United States to the Wool estate for the moneys paid over by the Secretary to Sanborn. If there ever was such liability, primary or secondary, it was ended by limitation long ago.

IV. If the act of collecting was illegal so was the act of receiving the collection by the Secretary. As between two wrong doers, the law will not interfere, but leaves the parties where it finds them.

V. If the money paid by the Secretary of the Treasury to Sanborn, belonged to the United States, and if the payment was made without authority of

law, the United States has its remedy against the Secretary who paid it.

VI. If the money belonged to the United States, which Sanborn received in his capacity as an agent, then no suit can be maintained against him by the Government until his account shall have been settled in the Treasury Department and the same shall have been duly stated.

No such statement is found in the record.

VII. An action of *indebetatus assumpsit*, which is of itself held to be purely an equitable action, cannot be maintained against a party who has innocently received money without the knowledge of any fact showing why he should not retain it, without notice or demand on him for its return.

Is this the fact? Specially, would he ~~not~~ be liable for any interest until suit brought?

Jacobs vs. *Adams*, 1 Dall., 52;
Redfield vs. *Ystalyfera Iron Co.*, 110 U. S., 174;
Vose vs. *Philbrook*, 3 St., 336;
Grammer vs. *Carroll*, 4 Cr. C. C., 400.

In this suit, without any prior notice or demand, interest was computed from the day Sanborn received the money.

So this judgment is erroneous and must be set aside for this, if for no other, cause.

Respectfully submitted.

BENJ. F. BUTLER,
O. D. BARRETT,
of Counsel.